

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
STATESVILLE DIVISION

In Re:	)	Case No. 95-50581
	)	Chapter 13
JOHN CHARLES LLOYD and	)	
ROBIN PRESNELL LLOYD,	)	
	)	
Debtors.	)	

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ORDER

This matter comes before the Court upon the Motion for Leave to Appeal and the Motion for Stay Pending Appeal filed by the Debtors through their Attorney on October 11, 1995. The Notice of Appeal, filed contemporaneously with the two motions, indicates that the Debtors are appealing the Order of this Court dismissing their Chapter 13 Bankruptcy case. That Order was entered on October 6, 1995 following a hearing on the matter in Statesville, North Carolina. After a review of the Court's records, the following appears:

1. The Debtors filed their first Chapter 13 case on December 9, 1994 in the Middle District.

2. BB&T filed for relief from stay on March 13, 1995. That relief was granted on May 5, 1995.

3. The first Chapter 13 case was dismissed at the request of the Debtors on May 17, 1995, 12 days after BB&T obtained relief from stay.

4. The Debtors filed the present case, their second Chapter 13, on August 23, 1995 in the Western District, less than 180 days after the dismissal of their first case.

5. The Court dismissed the Debtors' second case on October 6, 1995 under section 109(g)(2) of the Bankruptcy Code. Section 109(g)(2) of the Code provides that:

". . . no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title."

11 U.S.C. § 109(g)(2).

6. Following In re Keziah, 46 B.R. 551 (W.D.N.C. 1985), the Court found that the purpose of section 109(g)(2) is to ensure that debtors cannot prevent creditors from exercising their right to foreclose on the debtor's property, after properly obtaining relief from stay, by dismissing their bankruptcy case and refiling. The Court also found that Congress did not invest the Bankruptcy Judge with any discretion in the application of section 109(g)(2). Speaking to that point, the Keziah court found that "[t]he command is clear and there is no provision authorizing the Bankruptcy Judge to use his judgment to determine whether the statute should apply." Id. at 554.

7. Having found that Congress intended an objective test with regard to the application of section 109(g)(2) rather than a subjective one that considers the state of the Debtor's mind at the refiling date, the Court applied that section to the present case. The Debtors filed a second Chapter 13 less than 180 days after voluntarily dismissing their first Chapter 13, which occurred after BB&T was granted relief from stay. This situation falls squarely within the prohibition set out in section 109(g)(2). As a result, the Court dismissed the Debtors' second Chapter 13 case.

8. The Debtors properly filed a Notice of Appeal and a Motion for Stay Pending Appeal on October 11, 1995. It appears that granting the Motion for Stay Pending Appeal would frustrate the purpose of section 109(g)(2) by allowing the Debtors to prevent BB&T from exercising their right of foreclosure while the appeal is pending. Therefore, the Debtors' Motion for Stay Pending Appeal must be DENIED.

IT IS THEREFORE ORDERED THAT:

The Debtors' Motion for Stay Pending Appeal is DENIED. Further, the Debtors' Motion for Leave to Appeal is unnecessary because they are appealing a final order of the bankruptcy court. Therefore, the Notice of Appeal will continued to be processed with no action being taken on the Debtors' Motion for Leave to Appeal.

This the \_\_\_\_\_ day of \_\_\_\_\_, 1995.

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United States Bankruptcy Judge